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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,

Petitioner

—v.—

RAYMOND J. PLACE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION, *AMICI CURIAE*

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INTEREST OF AMICI[1/]

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the principles of freedom and democracy embodied in the Bill of Rights. The New York Civil Liberties Union is the New York state affiliate of the ACLU, with a membership of 20,000.

Among the freedoms guaranteed by the Bill of Rights is the right to be free from unreasonable government searches and seizures. The Fourth Amendment erects a critical barrier between the government and the citizen, defining the standard the government must meet whenever it seeks to invade "the right of the people to be secure in their

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1/ Letters of consent to the filing of this brief from the parties have been lodged with the Clerk of the Court.

persons, houses, papers, and effects ...."

The ACLU and NYCLU have repeatedly urged upon this Court a "strict construction" of that Amendment. In this case, the United States strays far indeed from such a construction, urging this Court to depart from the traditional rule, forged in the colonial period and the struggle over the writs of assistance, that persons have a right to be free from seizures of personal property absent probable cause. It is the purpose of this brief to demonstrate that the arguments made to support the Government's position are without merit. Whatever may be the case for the kind of brief "detentions" of luggage in connection with the brief investigative stops sanctioned in Terry v. Ohio, 392 U.S. 1 (1968) and its progeny, stops that "usually consum[e] less than a minute", Dunaway v. New York, 442 U.S. 200, 210-

211 (1979), probable cause is constitutionally required to justify the lengthy seizure of property involved here.

STATEMENT OF THE CASE

Only one relevant fact is not adequately set forth in the decision of the Court of Appeals, 660 F.2d 44 (2nd Cir. 1981).

Agent Gerard Whitmore, the DEA agent based at La Guardia Airport contacted by Miami detectives after they became suspicious of Mr. Place, was the arresting officer in all except one of the airport search cases that reached the Second Circuit between 1977 and the present. See, e.g., United States v. Vasquez, supra, cert. den. 447 U.S. 907 (1980); United States v. Vasquez-Santiago, 602 F.2d 1069 (2nd Cir. 1979), cert. den. 447 U.S. 911 (1980); United States v. Price, 599 F.2d 494 (2nd Cir. 1979);

United States v. Rico, 594 F.2d 320 (2nd Cir. 1979); United States v. Riqueliny, 572 F.2d 947 (2nd Cir. 1978); United States v. Buenaventura-Ariza, 615 F.2d 29 (2nd Cir. 1980); United States v. Forero-Rincon, supra; United States v. Place, 660 F.2d 44 (2nd Cir. 1981); United States v. Garcia, 450 F. Supp. 1020 (E.D.N.Y. 1978); United States v. Flores, 462 F. Supp. 702 (E.D. N.Y. 1978); United States v. Oyala, 77 Cr. 569 (E.D.N.Y. Dec. 21, 1977), aff'd 594 F.2d 853 (2nd Cir. 1978); United States v. Medina, 77 Gr. 460 (E.D.N.Y. Nov. 29, 1977). He has been termed "one very active DEA agent," United States v. Vasquez, 612 F.2d 1338, 1351 (2nd Cir. 1979) (Oakes, J., dissenting), and "ubiquitious", United States v. Forero-Rincon, 626 F.2d 218, 220 n.4 (2nd Cir. 1980). Agent Whitmore's experience at La Guardia Airport has been

so active as to render absurd the government's suggestion (Br. at 32-33) that La Guardia is such a backwater in the DEA struggle against narcotics trade that the regular presence of a trained dog there would be inefficient.

SUMMARY OF ARGUMENT

The exception the Government seeks here to the general requirement that more-than-momentary seizures be based on probable cause is not limited to brief stops at airports. The Government seeks, instead, a broad rule authorizing police seizure of personal property from public places for indefinite periods of time approaching 22 hours, and the removal of such property to distant facilities, so long as investigative procedures performed on the property do not amount to "searches" within the meaning of the Fourth Amendment.

1. The early history of resistance to arbitrary search and seizure in seventeenth and eighteenth century England and the Colonies reveals that the protection of property from seizure absent probable cause was the motivating prin-

ciple leading to the Fourth Amendment. The cases involving John Wilkes, the struggle over the Stamp Act and other British customs and tax measures in the Colonies, and the controversy concerning the Writs of Assistance all refute the Government's suggestion here that seizures of property are lesser Fourth Amendment intrusions, unprotected by the probable cause requirement.

2. This Court's early Fourth Amendment precedents faithfully reflect that early history, and demonstrate that the probable cause requirement protects seizures and searches of property, whether the seizure is undertaken for purpose of search or vice versa.

3. Although the Court has discarded the early theory that the government could only seize items over which it could establish superior property rights, Warden v. Hayden, 387 U.S. 294 (1967),

it has not deviated from its historic understanding that the Fourth Amendment protects interests in both property and privacy, and that the Fourth Amendment is violated where an individual's legitimate expectations of privacy and security in his property are invaded. Katz v. United States, 389 U.S. 347 (1967); Rakas v. Illinois, 439 U.S. 128 (1978); Torres v. Puerto Rico, 442 U.S. 465 (1979).

Even where exigent circumstances have justified dispensing with the warrant requirement, such as with automobiles on the highways, probable cause has been required to justify more-than-momentary seizure or search. Thus, absent probable cause, the luggage at issue here would plainly have been protected from more than the momentary seizure involved in a Terry stop had it been found in a moving automobile.

Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977). Nor would the exceptions to the probable cause requirement established in Terry v. Ohio, 392 U.S. 1 (1968) or its progeny support the broader exception sought by the government here.

4. The Court recently rejected a similar exception to the probable cause requirement in Torres v. Puerto Rico, supra, which Puerto Rico advanced on precisely the grounds on which the United States rests its case here, namely the generalized interest in law enforcement. In any event, applying the analysis set forth in Terry and its successors, the creation of an exception to the probable cause requirement for more-than-momentary detentions of personal property seized from its owner is not warranted. The generalized interest in law enforcement has never supported

such an exception, and the Fourth Amendment makes clear that it could not do so. Torres v. Puerto Rico, supra; Dunaway v. New York, 442 U.S. 200 (1979). The additional justifications relied on in Terry, United States v. Brignoni-Ponce, and Michigan v. Summers, 452 U.S. 692 (1981) -- officer safety, special border control concerns, or the existence of a closely related magistrate's determination of probable cause -- are wholly lacking here. The intrusion here is severe, far more substantial than the mere detention of property, because the dispossed traveler is necessarily tied, as on a tether, to the officers who seize and remove the property, forced to alter plans and keep in touch with the police so that, when they choose to return the property, he can reclaim it. The seizures contended for by the Government place far more discretion

in the hands of police than do the stops in Terry or its followers, since they are not circumscribed in place and can last far longer . Finally, upholding the seizure in this case would swallow the long-accepted rule, reaching back to the colonial struggles, forbidding seizures without probable cause.

ARGUMENT

THE SEIZURE OF PERSONAL LUGGAGE AT AN AIRPORT IN THE ABSENCE OF PROBABLE CAUSE VIOLATES FUNDAMENTAL AND WELL-ESTABLISHED FOURTH AMENDMENT PRINCIPLES.

Introduction

The Government's argument in this case is as straightforward as it is pernicious: simply put, any person stopped on the street or in any public place under the "reasonable suspicion" standard of Terry v. Ohio, 392 U.S. 1 (1968) and its progeny[2/] could be deprived of a wallet, a handbag, a briefcase, or other personal property, for uncircumscribed investigatory procedures so long as those procedures do not amount to a

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2/ See Adams v. Williams, 407 U.S. 143 (1972); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Pennsylvania v. Mimms, 434 U.S. 106 (1977); Michigan v. Summers, 452 U.S. 692 (1981). Cf. Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Mendenhall, 446 U.S. 544 (1980).

"search."[3] If accepted by the Court, that argument would eviscerate the Fourth Amendment "right of the people to be secure in their ... papers and effects ... " by driving a wedge between "searches" and "seizures" of property, removing the largest category of police "seizures" of personal property -- those commenced for the purpose of searching the property -- from the protection of the Fourth Amendment's probable cause standard. Though the Government concedes that probable cause is uniformly required

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[3] This case does not present the question, currently much debated in the lower courts, whether canine sniffing is a "search" within the meaning of the Fourth Amendment. See generally Horton v. Goose Creek Independent School District, 677 F.2d 471 (5th Cir.) and cases cited therein. The respondent challenged the admission of the evidence seized from his luggage solely as the fruit of an unlawful seizure, not as the fruit of an unlawful search, and the judgment below rests on that basis.

to search personal property, it nevertheless contends that the "investigative detention" (i.e., seizure) of property which precedes such a search is permissible under a lesser standard.

The Government's argument is a transparent attempt to transform -- indeed, rewrite -- the Fourth Amendment. It would have the Court radically expand the limited investigatory detentions of persons solely for the purpose of inquiry approved in Terry, by sanctioning lengthy[4/] seizures which intrude upon personal privacy, mobility, property,

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4/ The Government's brief is extremely vague on how long a "temporary detention" must be before it would be subject to the probable cause requirement. We are told that it may be "of longer duration than a detention of a person" (Br. 11). Even if the citation to the 22-hour stop in United States v. Regan, No. 81-1722 (1st Cir. Sept. 1, 1982) (Br. 26) suggests that the Government views that stop there as an outer limit, which is (footnote continued on following page)

and liberty, absent any justification beyond the general needs of law enforcement. In proffering this argument the Government ignores the language, history, traditions and well-established principles repeatedly announced by this Court that are the bedrock of the Fourth Amendment. Instead, the Government argues for a society in which mere police suspicions will authorize lengthy seizures of the personal belongings of those who venture outside of their homes.

(footnote continued from preceding page) unclear, there is no reason to believe that shorter seizures would require probable cause under the Government's view. Although in this case the police garnered probable cause in shortly under two hours, the length of the detention here is properly measured not by that period, but rather by the time it would have taken Agent Whitmore to return the luggage to Mr. Place (wherever that be) had the dog sniff been unavailing, a minimum of 3-5 hours, or perhaps by the time Mr. Place was informed the detention might last -- i.e., indefinitely.

A. The Language And The Historical Underpinnings Of The Fourth Amendment Demonstrate That The Full Panoply Of Its Protections Apply Not Only To Search But Also To Seizure Of Property.

At the outset of its brief, the Government sets out only the clause of the Fourth Amendment concerning unreasonable searches and seizures, wholly omitting the warrant clause and its familiar requirment of probable cause.[5] (Br. 2). As the text of the brief makes clear, the omission is hardly accidental; the premise of the Government's argument is its view that "[b]y its terms, then, the Fourth Amendment does not require that searches or seizures be based on

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5/ "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." (emphasis added)

probable cause."[6]

The origins of the Amendment, however, confirm both that the probable cause requirement was the basic criteria of reasonableness, and that the framers' uppermost concern was with the "things to be seized". Contrary to the Government's argument here, the protection from Government excess at which the Amendment was directed had at its root the desire to protect property from seizure absent probable cause.[7]

As leading scholars of the origins of the Fourth Amendment have made clear[8],

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6/ Br. 15.

7/ See generally Warden v. Hayden, 387 U.S. 294, 303-305 (1967).

8/ See Lasson, The History and Development of the Fourth Amendment to the United States Constitution, Johns Hopkins Press (1937), at 37-40 (hereafter "Lasson"); Landynski, Search and Seizure And The Supreme Court, Johns Hopkins Press (1966), (footnote continued on following page)

early resistance to oppressive search and seizure measures focused primarily upon three abuses extant shortly after the restoration of the Crown in England in 1660: writs of assistance were employed to prevent smuggling abuse; a "hearth money tax" was collected by means of forced entry; and seditious libel was rooted out by blanket search and seizure. Through the twenty five years preceding the Revolution of 1688, Charles II caused general warrants and writs of assistance to be issued regularly to garner his revenue and to suppress dissent. When the House of Commons, bridling at these measures, finally took action, it cited Chief Justice Scroggs in articles of

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(footnote continued from preceding page) at 19-30 (hereafter "Landynski"). Both have been frequently relied on by this Court. See, e.g., Payton v. New York, 445 U.S. 573, 583 n.21 (1980); Warden v. Hayden, 387 U.S. at 301 n.9.

impeachment for issuing general warrants authorizing "'seizing the goods of his majesty's subjects, not named or described particularly ....'"[9/]

Not until the middle of the Eighteenth Century did resistance to oppressive search and seizure laws result in formal restraining legislation. Both in England and the Colonies the efforts of the Crown to tax and to control smuggling resulted in the establishment of principles akin to the Fourth Amendment. The colonial legislation was a reaction to England's measures of economic oppression, which had been enforced by unrestricted seizures

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9/ Lasson at 38 (emphasis added). Lasson also relates the 1683 trial of Algernon Sidney, whose writings were seized pursuant to a general warrant, only to have a second search warrant issued authorizing seizure of his personal belongings. Lasson at 39 n.94.

of colonial property.[10/]

Foremost among the events in England were the arguments in the early 1760's of William Pitt against the broad search and seizure provisions of a cider excise tax which, as could be expected, affected much of the population. Riots led to its repeal at

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10/ See generally Lasson at 45-78. These events on this side of the Atlantic coincided with the famous £ 300 jury award in favor of John Entick from whose home seditious writings had been seized. The historic decision of Lord Camden (formerly Chief Justice Pratt) in Entick v. Carrington, which was relied on extensively in the seminal decision of Boyd v. United States, 116 U.S. 616 (1886), expressed the view that personal property, as distinguished from property claimed by the Crown, must be protected against arbitrary seizure pursuant to general warrants. See Warden v. Hayden, 387 U.S. at 303-304; Stanford v. Texas, 379 U.S. 476, 483 (1965). Similarly, the celebrated cases involving John Wilkes rested primarily on the illegal seizures, not merely on the searches involved. See Lasson, at 43-47; Landynski, at 27-28.

the same time that the House of Commons recognized that general warrants were not to be issued. Pitt's crusade in the House of Commons resulted in the formal outlawing of general warrants in 1766.[11]

In the Colonies the struggle against abusive searches and seizures centered directly on the invasion of property interests. The "hated writs of assistance"[12] relied on to enforce customs laws and taxation were the irritant which led to adoption of the Fourth Amendment. Seizures of private property under the writs focused the resistance against England which finally led to the Revolution.[13]

Throughout, the controversy was econ-

11/ Lasson, at 48-49.

12/ Stanford v. Texas, 379 U.S. at 481.

13/ Landynski, at 31-38; Lasson, at 51-79.

omic. England sought to restrict trade by the Colonies in order to protect the British West Indies; the colonists, on the other hand, smuggled less expensive imports from the non-British West Indies. In 1760, Britain started to use the writs of assistance to enforce the trade laws strictly. Each time a writ was executed and property seized, the Crown was, in essence, claiming colonial property as its own. The colonists were galled that the writs granted unbridled discretion to their enforcers and were completely general in nature, without judicially imposed limits upon time, place or manner of execution.[14/]

In 1764 the English Government changed its colonial policy placing

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14/ Lasson, at 54. The most famous expression of this opposition, of course, is the celebrated argument of James Otis. See Lasson, at 58-61; Landynski, at 34-35.

primary emphasis on taxation of imports rather than customs control.[15] This form of partial relief did not satisfy the colonists, who were committed to the proposition that oppressive seizures of their property were intolerable.

In 1768 England issued the Townsend Acts which eliminated all of the technical and procedural arguments that the colonial lawyers had raised against the issuance of the writs. Nevertheless, even after their enactment, the colonial courts regularly refused to issue the writs and general warrants, despite their clear mandate to do so.[16]

Based on their experience of oppression by unregulated search and seizures, several colonies took action during the Revolution, through their colonial char-

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15/ Lasson, at 67.

16/ Lasson, at 72-76.

ters, to protect their citizens from unrestrained search and seizure.[17] The Pennsylvania charter of 1776 was the first provision nearly approximating the Fourth Amendment.[18] Uniformly, these provisions

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17/ Lasson, 79-82.

18/ Lasson, supra, at 81 n.11 quotes section X of the Pennsylvania Charter as follows:

> That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, are contrary to that right, and ought not to be granted.

As Lasson indicates, the clear import of this provision was protection not from all searches and seizures but only from those undertaken without "a sufficient foundation", i.e., probable cause. Id.

addressed themselves not merely to searches, but equally to the protection of property from arbitrary seizure, that is, seizure not based on probable cause. Not surprisingly, the same concern was reflected in the final wording of Fourth Amendment as adopted by the Constitutional Convention in 1790.[19/]

Thus, the Framers' unbroken twenty-year concern with seizures of their property resulted in the establishment of new basic rights. Of course, the invasive searches and unrestrained arrests that accompanied England's efforts to stifle "illegal" colonial activity had provoked and catalyzed resistance. But, historically, it is impossible to deny that it was the underlying interest in preserving their property from seizure

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19/ Lasson, at 101-103.

in the first instance, in limiting searches precisely because they were undertaken for the purpose of seizure, which moved the revolutionaries to action in both England and the Colonies.

B. This Court's Early Precedents Emphasized The Fourth Amendment's Protection Against The Seizure Of Property Without Probable Cause.

In 1886, in Boyd v. United States, supra, the Court interpreted broadly the reach of Fourth Amendment protections. Boyd involved a statute which compelled, without probable cause, production of books and papers which, although not themselves contraband, were nevertheless incriminating evidence. Citing Entick v. Carrington, supra, the Court analogized the procedure to the seizures authorized by the infamous writs of assistance. Justice Bradley declared the statute unconstitutional under both the Fourth and Fifth Amendments and

announced his now famous description of the broad interests protected by the Fourth Amendment:

> It is not the breaking of [a person's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property ....

116 U.S. at 630 (emphasis added).[20/]

Several other of the Court's early cases also involved the protection of property interests against seizures without probable cause. In Weeks v. United States, 232 U.S. 383 (1914) the Court held that a conviction based on evidence

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20/ Although "several of Boyd's express or implicit declarations have not stood the test of time", Fisher v. United States, 425 U.S. 391, 405 (1976), see also United States v. Ward, 448 U.S. 242, 253-55 (1980), Justice Bradley's formulation cited above has never been overruled, and remains good law. See, e.g., Katz v. United States, 389 U.S. 347, 350-53 (1967).

seized without warrant from the home of a man who was contemporaneously arrested elsewhere required reversal of his conviction and the return of his personal property. Similarly, in Gouled v. United States, 255 U.S. 298 (1921), seizures of property effectuated by a government officer's stealth in the defendant's were likewise condemned.[21] In both these cases the Court was presented with searches undertaken for the purpose of seizing evidentiary, non-contraband property. The procedure the Court sanctioned to challenge these

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21/ See also Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390 (1920), where convictions were reversed because after arrest marshals "made a clean sweep of the office of [defendants'] company ... without a shadow of authority." See also Amos v. United States, 255 U.S. 313 (1920).

seizures was based upon the defendant's petition for the return of his property based on illegal seizure, rather than for its suppression based upon violation of his constitutional right to privacy. E.g., Weeks v. United States, 232 U.S. at 387. Indeed, in Weeks it was not disputed that the arrest of the suspect was based upon probable cause; yet the Court refused to uphold the seizure as incident to that (distant but contemporaneous) arrest, holding instead that the subsequent evidentiary seizure was required to comport independently with the Fourth Amendment's probable cause and warrant standards.

Similarly, the Court consistently required strict adherence to the requirement of probable cause even where property seizure was incident to lawful arrest. In Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) and United States

v. Lefkowitz, 285 U.S. 452 (1932), non-contraband personal property was seized as evidence at the site of a concededly valid arrest. Though probable cause to arrest was not in doubt and, consequently, it could be reasonably inferred that the property seized was relevant evidence, the Court nevertheless treated the property as outside the scope of material which the Government could have cause to seize.[22/]

The Court's protection of the right to be free from property seizure absent probable cause can also be seen in cases like Taylor v. United States,

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22/ Gouled and Lefkowitz would be differently decided today in light of the abolition of the mere evidence rule in Warden v. Hayden, supra. However, the point for which the cases are here cited -- the protections long afforded by this Court not only to the privacy interest implicated by searches but also to the property interests implicated by seizures -- remains valid.

286 U.S. 1 (1932). In Taylor, a case closely analogous to the present one in certain respects, a unanimous Court during Prohibition reversed a conviction based on property unlawfully seized even when its odor and complaints from neighbors gave police probable cause to believe that it was whiskey. Although a search was involved, Justice McReynolds' opinion emphasized that both "the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him," and held that "the action of the agents was unexcusable and the seizure unreasonable." 286 U.S. at 6. Indeed, throughout the period of early judicial application of the Fourth Amendment, the Court's focus was usually on the warrant clause precisely because of the Court's perception that faithfulness to it was necessary to protect the Fourth Amendment interest in freedom

from unreasonable seizure of property absent probable cause. See United States v. Lefkowitz, 285 U.S. at 464; Carroll v. United States, 267 U.S. 132, 154 (1925); Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931); Gambino v. United States, 275 U.S. 310 (1927); United States v. Lee, 274 U.S. 559 (1927).

In short, the Court's early cases reflect the origins of the Fourth Amendment. The Court assiduously protected private property against seizure other than under the probable cause standard. Whether under the warrant requirement or not, and whether search was for the purpose of seizure or vice versa, probable cause remained the touchstone of Fourth Amendment law during the first half of this century.

C. The Court's Recent Cases Have Adhered To The Fundamental Principle That The Seizure Of Personal Property And Effects Must Be Based Upon Probable Cause.

The Court's early understanding that seizures of property were unreasonable absent probable cause has remained unchanged, despite a variety of doctrinal developments expanding in other respects the scope of permissible searches and seizures. Thus, in Warden v. Hayden, abandoning the rule that mere evidence could on no account be seized, the Court nevertheless stressed that probable cause was a prerequisite to valid seizure of property:

> There must, of course, be a nexus--automatically provided in the case of fruits, instrumentalities or contraband--between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehansion or con-

viction.

387 U.S. at 367.[23]

23/ In displacing early conceptions of Fourth Amendment rights based on superior property rights between a possessor and the Government, the Court stated in Warden v. Hayden that "the principal object of the Fourth Amendment is protection of privacy rather than property", reasoning that "[t]he premise that property interests control the right of Government to search and seize has been discredited." 387 U.S. at 304. However, Hayden's holding that the Government may search or seize (given probable cause) even though it has no superior property right did not mean that protection of property from unjustified search or seizure is not a principal function of the Fourth Amendment, especially where personal property is seized from the very hands of its owner. Neither the reasoning of Hayden nor anything else subsequently decided suggests a result so at odds with logic or history. Indeed, the Court has repeatedly stressed that the Fourth Amendment protects individuals whose property is seized from them unlawfully. See, e.g., Torres v. Puerto Rico, 442 U.S. 465 (1979) (seizure and search of luggage at airport); Rakas v.Illinois, 439 U.S. 128, 135-6, 142 n.11, 143 n.12 (1978); Katz v. United States, 389 U.S. at 350-353 and n.4; United States v. Salvucci, 448 U.S. 83 (1980).

Similarly, although the Court has expanded on the rationale of Carroll v. United States and relaxed the warrant requirement for searches and seizures in cases involving narrowly defined exigent circumstances, it has repeatedly emphasized that it could do so without jeapordizing critical Fourth Amendment interests because the bedrock requirement of probable cause to search or seize remained intact. See, e.g., Chambers v. Maroney, 399 U.S. 42, 52 (1970); Coolidge v.New Hampshire, 403 U.S. 443 (1971); Cardwell v. Lewis, 417 U.S. 583 (1974) (seizure of automobile unaccompanied by interior search). Chambers, Coolidge, and Cardwell are especially pertinent here, since in each case personal property considerably less private than luggage -- namely automobiles -- was seized for the purpose of searching for incriminating

evidence. Yet the Court required that the seizures in these cases could only be based upon probable cause, whether in conjunction with a search (Chambers, Coolidge) or not (Cardwell).

The Court's continuing commitment to probable cause as the constitutional prerequisite to such a seizure generally, and especially of personal property like luggage at issue here, was dramatically reaffirmed last term in United States v. Ross, 72 L.Ed.2d 572 (1982). In Ross, both the majority and dissent explicitly agreed, on the basis of United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), that "'a person's expectations of privacy in personal luggage are substantially greater than in an automobile.' [433 U.S. at] 13." 72 L.Ed.2d at 585, 594, 598, 600. Ross, Sanders and Chadwick are all cases about the seizure and search of luggage. Each

unquivocally reaffirms the principle that probable cause is a prerequisite to the seizure for the purpose of search of personal belongings whether these belongings are carried in a car (Ross), arrive at a train station (Chadwick), or are picked up at an airport (Sanders).[24/]

Ross renders the Government's position here nearly insupportable. The United States urges the Court to approve a seizure of luggage, deserving of greater "expectations of privacy" than an automobile, on a basis less protective than probable cause, despite the unbroken line of authority in this Court prohibiting seizures of automobiles based on less than probable cause. The Government commends to this Court a Fourth

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24/ See the discussion of these cases in United States v. Ross, supra, 72 L.Ed.2d at 584-87.

Amendment scheme of seizures in which Mr. Place's luggage would have been protected on the basis of probable cause had he simply placed his bags in an automobile; but, because he did not, he was vulnerable to their seizure on the basis of reasonable suspicion at an airport. After Chadwick, Sanders and Ross, the anomaly of that result is evident.

Of course, the instant controversy would not exist but for the landmark decision of Terry v. Ohio, 392 U.S. 1 (1968), authorizing temporary investigative seizures of persons reasonably suspected of criminal activity. But the rule of Terry was "narrowly drawn" by the Court. 392 U.S. at 27. As such, it represented a constitutional response to a theretofore judicially unexamined aspect of routine police procedure -- the investigative stop -- which could

not be fairly evaluated under the traditional arrest analysis. 392 U.S. at 26-27.[25] For purposes of the instant case, Terry's significance is threefold: the narrowness of the exception created;[26] the fact that by its terms it only applies to seizures (and frisks)

25/ See also Dunaway v. New York, 442 U.S. 200, 209 (1979).

26/ "[S]uch a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See Preston v. United States, 376 U.S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." 392 U.S. at 29.

of persons; and the method by which the Court reached its decision.[27] In none of Terry's progeny, however, has the Court gone beyond Terry's rationale and "narrow scope"[28] and sanctioned anything other than extremely brief and localized seizures of persons. See, e.g., Adams v. Williams, supra (temporary seizure of person in automobile); United States v. Brignoni-Ponce, 422 U.S. 881-82 (temporary stop of automobile for questioning as to "citizenship and immigration status ... but any further detention or search must be based upon consent or probable cause"); Pennsylvania v. Mimms, supra (temporary removal of person from automobile for protection); Michigan v. Summers, 452 U.S. at 705 (limited authority to detain occupants of premises while search is

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[27] Discussed below at Point D, infra.

[28] Dunaway v. New York, 442 U.S. at 210.

conducted under warrant).

To the extent that Terry's progeny represent a recognition that an item of property -- an automobile -- may be momentarily "seized" along with its driver on the basis of reasonable suspicion, nothing in either the facts or reasoning of these cases leads to the conclusion which the Government seeks in this case. Mr. Place does not contest the authority of Agent Whitmore to detain him momentarily for investigation. Likewise, for that moment, Mr. Place also does not contest the concomitant seizure of his luggage. It is the additional lenghty seizure of his personal belongings and their forcible removal to a distant place for an indeterminate length of time which is at issue here. No case previously decided by this Court even begins to justify such an extensive seizure.

The Court's decision in United States

v. Van Leeuwen, 397 U.S. 249 (1970), relied on so heavily by the Government, is inapposite. In Van Leeuwen packages deposited by the defendant in the mail were held up for approximately a day while an investigation was undertaken in order to establish cause to obtain a search warrant. The cause for the detention was a suspicion that the packages contained contraband. Emphasizing that this was a case of voluntary relinquishment of property to the postal service, the Court sustained the seizure on the basis that

> no interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

397 U.S. at 253.

Here, it can hardly be disputed that a "significant Fourth Amendment interest" is involved in the coerced seizure of luggage from the hands of its owner. Mr. Place never voluntarily relinquished his property in a manner similar to that associated with mailing a parcel. Moreover, although the one day delay of mail in Van Leeuwen was well within the time within which mail might be delivered by the government to which it was entrusted, the delay here was not only well beyond that in which domestic travelers reasonably expect access to their luggage, but was also caused by third-party law enforcement officers. Mr. Van Leeuwen, unlike Mr. Place, never expected to have access to his parcels during the day they were delayed.

Were Mr. Place contesting the external inspection of his luggage by DEA agents or their dogs while it was checked

with or being processed by the airline, Van Leeuwen might be applicable precedent. But where, as here, the entire dispute centers on the seizure from Mr. Place's immediate possession of his personal belongings, Van Leeuwen is wholly inapplicable.[29/]

Finally, it is worth noting that not only do the Court's precedents not reach as far as the result contended here by the Government; more importantly, the Court has only recently rejected attempts to stretch the Terry rationale

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29/ The Court in Van Leeuwen specifically limited its ruling to "the facts ofthis case," 397 U.S. at 253, noting that even "detention of mail could at some point become an unreasonable seizure." 397 U.S. at 252. For extensive analysis of the reaons why Van Leeuwen is inapplicable to seizures of luggage at airports, see United States v. Martell, 654 F.2d 1356, 1366-69 (9th Cir. 1981) (Nelson, C.J., dissenting) and Comment, "Seizing Luggage on Less than Probable Cause," 18 American Criminal L. Rev. 637 (1981).

to support more extended seizures absent probable cause. In Brown v. Illinois, 422 U.S. 590 (1975) and Dunaway v. New York, supra, the Court examined the nature and duration of seizures of persons based on reasonable suspicion only, and concluded that the Fourth Amendment precluded such detentions that were longer than momentary and more intrusive than a simple investigative encounter. As the Court recognized in Dunaway, wishful governmental characterization of seizures as less intrusive and extensive than they in fact are cannot dilute the Fourth Amendment's fundamental protections:

> The central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. "The requirement of probable cause has roots that are deep in our history." Henry v. United States, 361 U.S. 98 (1959). Hostility to seizures based on mere suspicion was a prime motivation for the adop-

> tion of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest." Id. at 101. (footnotes omitted). The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule. 442 U.S. at 213 (emphasis added).

In short, the Court has repeatedly stressed that all seizures, other than those of persons held for brief inquiry, must be based upon probable cause. No distinction has been made between the seizure of property and its search, and no case has subject the former to a lesser substantive standard of justification. Rather, the several warrant clause cases concerning automobile and luggage seizures even when seizure and search are undertaken together demonstrate exactly the

opposite conclusion: either search or seizure, or both, are generally supportable only on probable cause.

D. No Categorical Exception To The Generally Applicable Probable Cause Standard Should Be Made For The Detention Of Personal Effects.

In Torres v. Puerto Rico, 442 U.S. 465 (1979), a case conspicuously absent from the Government's brief, this Court flatly rejected Puerto Rico's arguments for a categorical exception to the probable cause requirement for seizure and search of luggage at airports. Puerto Rico had passed a law authorizing the search of any arriving passengers' luggage as a response "to a serious increase in the importation of firearms, explosives, and narcotics from the mainland, and a concomitant rise in crime on the island." 442 U.S. at 466-7. Torres' luggage was seized and searched

at the airport by an officer whose suspicions were aroused by his nervous behavior. 422 U.S. at 467. The Court reversed Torres' conviction despite the argument of the Commonwealth that its law enforcement needs coupled with its special political status and geographic vulnerability required an exception to the Fourth Amendment's probable cause requirement. In language controlling this case the Court held:

> The governmental interests to be served in the detection or prevention of crime are subject to traditional standards of probable cause to believe that incriminating evidence will be found.
>
> * * *
>
> Puerto Rico's position boils down to a contention that its law enforcement problems are so pressing that it should be granted an exemption from the usual requirements of the Fourth Amendment. Although we have recognized exceptions to the warrant requirement when specific circumstances render compliance impracticable, we have not dispensed with the fundamental Fourth Amendment

> prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement. Almeida-Sanchez v. United States [413 U.S. 266] at 273-275 [(1973)]; United States v. Di Re, 332 U.S. 581, 595 (1948).
>
> In any event, Puerto Rico's law enforcement needs are indistinguishable from those of many other states.

442 U.S. at 471, 473-74.

Although the Torres Court did not carefully specify the considerations that guide the Court's determination as to whether to recognize an exception to the probable cause requirement, recent cases make the proper approach clear. As the Government appears to concede (Br. 16), exceptions to the probable cause requirement are never made on an ad hoc basis.[30] Instead, an exception

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30/ As the Court stated in Dunaway, 442 U.S. at 213-14:

> In effect, respondent urges us to adopt a multifactor balancing

(footnote continued on following page)

will be made only on a categorical basis,

(footnote continued from preceding page)
test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly, defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause. (footnotes omitted).

after considering the justification for the intrusion;[31] the nature and degree of the intrusion; the extent to which an exception might grant law enforcement personnel unbridled discretion;[32] and

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31/ In Michigan v. Summers, 452 U.S. at 698-99, the Court referred to "special enforcement problems" that constitute "substantial law enforcement interests."

32/ Preventing unbridled discretion in law enforcement officers has been a principal concern of this Court's recent Fourth Amendment jurisprudence. See, e.g., Johnson v. United States, 333 U.S. 10, 13-17 (1948); McDonald v. United States, 335 U.S. 451, 455-56 (1948); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Beck v. Ohio, 379 U.S. 89, 97 (1964); See v. Seattle, 387 U.S. 541, 545 (1967); United States v. United States District Court, 407 U.S. 297, 316-17 (1973); Alameida-Sanchez v. United States, 413 U.S. 266, 274 (1973); United States v. Martinez-Fuerte, 428 U.S. 543, 558-66, n.18 (1976); G.M. Leasing Corp. v. United States, 429 U.S. 338, 357 (1977); Marshall v. Barlow's Inc., 436 U.S. 307, 322-24 (1978); Mincey v. Arizona, 437 U.S. 385, 394-95 (1978); Delaware v. Prouse, 440 U.S. 648, 653-55, 661-63 (1979); Brown v. Texas, 443 U.S. 47, 51 (1979); Steagald v. United States, 451 U.S. 204, 220 (1981); and Donovan v. Dewey, 452 U.S. 594, 599-602, 605 (1981).

the danger that the exception "would threaten to swallow the general rule."[33/] See, e.g., Michigan v. Summers, 452 U.S. at 701-05; Dunaway v. New York, 442 U.S. at 210; Delaware v. Prouse, 440 U.S. at 653-54; United States v. Brignoni-Ponce, 422 U.S. at 878; Terry v. Ohio, 392 U.S. at 20-21.

Consideration of these factors, and of previous cases where the Court has considered them, makes plain that no categorical exception to the probable cause requirement is warranted for lengthy seizures of luggage at airports such as occured in this case.

1. Justification for the Intrusion

The justification for the intrusion here is far less weighty than in Terry,

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33/ See, e.g., Dunaway v. New York, 442 U.S. at 213; Michigan v. Summers, 452 U.S. at 697.

Brignoni-Ponce, Mimms or Summers. The interest asserted here is simply the generalized interest in law enforcement, an interest always present in such cases and one which the framers of the Fourth Amendment themselves determined was inadequate to support search or seizure, absent probable cause. Torres v. Puerto Rico, 442 U.S. at 474. Unlike the special risk to the safety of law enforcement officers relied on in Terry, Adams, Mimms and Summers, or the special factors involving border control relied on in Brignoni-Ponce, the United States has not (and could not) point to special law enforcement needs justifying the lengthy seizure here. Indeed, Torres appears dispositively to reject as insufficient the justification for the categorical exception contended for here.[34]

34/ Although Torres involved both a seizure and search, nothing in the Court's
(footnote continued on following page)

Michigan v. Summers, on which the Government heavily relies, provides it no support. The two justifications pointed to by the Court there are not present here. See generally 452 U.S. at 701-04. First, the Government does not contend, nor could it, that there was a need based on officer safety to seize Mr. Place's luggage. Second, the Court in Summers laid "prime importance" on "the fact that the police had obtained a warrant to search respondent's house for contraband [thereby authorizing] ... a substantial invasion of the privacy of the persons who resided there." 452 U.S. at 701, 703. That justification is wholly absent here too.[35/]

(footnote continued from preceding page) opinion suggests that the Court was prepared to accept a seizure alone on the justification proferred by Puerto Rico. As demonstrated in Points A, B, and C, supra, the history of protection from unreasonable search and seizure would not support such a distinction.

35/ The Summers Court also indicated (footnote continued on following page)

2. The Extent of The Intrusion

As the history canvassed above makes clear, the government's contention that seizure of a person's personal effects absent a search is a minimal intrusion of Fourth Amendment interests is insupportable. The stress that Katz v. United States, 389 U.S. 347 (1967) and subsequent cases laid on the privacy values invaded by searches is not at all inconsistent with the continued understanding, first voiced in Boyd, 116 U.S. at 630, that seizure of an individual's property, when he manifests a legitimate expectation of continued privacy, security, and possession over it, is equally protected. Indeed, Katz expressly so recognized, observing that the Fourth Amendment "protects individual privacy against certain kinds of govern-

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(footnote continued from preceding page) that even the justification present there might give way when the detention was "prolonged". 452 U.S. at 705 n.21.

mental intrusion, but its protections go further and often have nothing to do with privacy at all." 389 U.S. at 350 (emphasis added). The citation provided by the Court for that proposition was to Justice Black's observation, dissenting in Griswold v. Connecticut, that "the average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth." 389 U.S. at 350 n.4.[36/]

36/ Nor does United States v. Lisk, 522 F.2d 228 (7th Cir. 1975) support the government's view here. Then-Judge Stevens distinguished between the search of a third party's car and the seizure from it of the defendant's property, but the distinction was plainly not intended to suggest that property seizures are generally lesser Fourth Amendment intrusions than property searches. The property whose seizure was upheld in Lisk was seized not from the defendant's hands, but from a car in which he had no expectation of privacy.

Close examination of the consequences of the stop at issue in this case amply demonstrates that, far from being less invasive than the Terry stop, investigative seizure ofproperty directly from an individual's possession as hereis substantially more invasive of Fourth Amendment interests in personal security, mobility, privacy, and possession of one's property than were the stops in Terry and its progeny.

Seizure from a traverl's hand of personal property, such as luggage, does not exist in the abstract; by its nature, it does not supplant, but rather inevitably accompanies, a full-fledged Terry stop. Moreover, the seizure of luggage inflicts anxiety and embarrassment that lasts at least as long as the owner is dispossessed. And, of course, since the owner reasonably believes that the luggage is seized for the purpose of a search, the anxiety is identical to that associated with a search.

These considerations, canvassed by the Court in Delaware v. Prouse, supra, are directly applicable here.

The real extent of the intrusion which the government seeks to justify here, however, reaches far beyond the brief Terry stop and the subjective fear and anxiety of the expected search. More than property is seized. As a practical matter, the individual whose luggage is seized is also seized for the same indeterminate period, or at least detained, as well. Like Mr. Place here, such a person does not know when or where his luggage will be released, and this uncertainty necessarily results in tying up the individual for as long as the detention lasts. A traveler needing luggage or briefcase materials seized, for example, cannot make a connecting flight or train. He may find it useless to travel further to his local destination without his property. Moreover,

unless he chooses to accompany the officers and his luggage, he must make arrangements to pick up his luggage when law enforcement officers decide they are through with it, either at some distant law enforcement facility, or, after waiting uselessly, back at the airport. Frequent telephone communication with law enforcement officers will usually be necessary to make these arrangements. In very real terms, detention of luggage places the person dispossessed on a tether to the seizing officers.[37/]

The Government weakly attempts to deal with one of these concerns, the inconvenience of being dispossessed of one's personal property while traveling, with the fanciful and disingenuous sug-

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37/ If an individual accompanies his luggage to a police facility, or if he is induced to claim the luggage at a law enforcement facility, of course, the factors found dispositive in Dunaway v. New York would come into play.

gestion that owners may remove essential items, such as medicine. (Br. 24) But police officers who suspect the possession of contraband would hardly allow a suspect private access to the container under suspicion, and under Terry such refusal would be amply justified by fear that a weapon would be present or that contraband such as drugs would be removed.

Thus, contrary to the Government's view that the intrusion of the seizure is minimal because travelers "will ordinarily be permitted to remove necessities" from luggage (Br. 24 n.13), the intrusion is severe because the price of access to one's own necessities will be compelled consent to full search of one's luggage, under the joint rubrics of plain view and officer safety.

3. Risk of Excessive Discretion.

Although based on a reasonable suspicion standard similar to the seizures

upheld in Terry, Brignoni-Ponce and Summers, the categorical exception sought here carries substantially higher risk of placing excessive discretion in the hands of law enforcement personnel.[38/] The duration of the seizure is, or can be at the discretion of the officer, much longer than was upheld in Terry or Brignoni-Ponce. Moreover, unlike those stops, this one can be extended geographically. Indeed, by requiring travelers to pick up luggage at police facilities, as would apparently be permissible, the police could accomplish indirectly what was forbidden in Dunaway, namely the physical transfer of a suspect to a police station absent probable cause. Nor is the seizure

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38/ The dangers of excessive discretion inherent in any standard short of probable cause have been noted by this Court. See, e.g., Dunaway, 442 U.S. at 213-14, quoted at n.30, supra; Reid v. Georgia, 448 U.S. 438 (1980).

here accompanied by a magistrate's closely related determination of probable cause, a factor heavily stressed in Summers.

4. The Exception Would Swallow The Rule.

Finally, as amici have shown above, the breadth of the exception contended for here would entirely eviscerate the probable cause requirement for property seizures where a search is not promptly undertaken.

The Government has completely failed to propose a logical limiting principle as to why airport luggage seizures present a "special enforcement problem" constituting "a substantial law enforcement interest" that will not "'threaten to swallow the general rule that Fourth Amendment seizures are "reasonable" only if based upon probable cause.'"[39/]

39/ Michigan v. Summers, 452 U.S. at 697, citing Dunaway v. New York, 442 U.S. at 213. See also Torres v. Puerto Rico, 442 U.S. at 474.

* * * *

Balancing these factors, the exception sought here is plainly indefensible. It bears on no extraordinary justification, such as officer safety or border control; it is substantially intrusive; it lends itself to excessive discretion of law enforcement personnel unchecked by neutral judgment and narrowly circumscribed rules; and it turns the usual probable cause requirement on its head. All this, for the sole reason that the United States government is assertedly unable to afford a trained dog at one of the nation's busiest airports to assist one of its most enterprising DEA agents.[40/]

If the Government's arguments are accepted, the common experience of passengers who are nervous before and after

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40/ See Br. at 32-33; see also supra at 3-5.

flying may well escalate into the trauma of a luggage seizure simply because a passenger has bought a ticket with cash or is observed looking around a waiting room for a traveling companion or a ride home. The fact is that ambiguous factors constitute reasonable suspicion. For this reason, reasonable suspicion does not amount to probable cause. Although such ambiguous factors may warrant investigation and even a Terry stop, they can hardly be characterized as a "reasonable" basis for the seizure of personal belongings and their forced removal for indefinite periods to unknown places.

The Government's attempt to equate a momentary investigative stop involving a few questions, with or without a frisk, with the indefiniteness and inconvenience of the seizure of luggage in these circumstances is unsupportable. Worry, substitute clothing and toiletries,

forced return to the airport or a police station, and disrupted travel, personal and business plans are the very reasons why the Fourth Amendment forbids unreasonable seizures, that is, seizures lacking probable cause.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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